

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BLAKE H. CHAPPELL,

Petitioner,

v.

ST. ANDRE,

Respondent.

No. 2:22-cv-1429 KJM AC P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. By order filed September 6, 2022, petitioner was ordered to show cause why the petition should not be dismissed as untimely. ECF No. 10. He has now filed his response and motion to stay. ECF No. 11.

The response to the order to show cause is largely comprised of the standards for seeking a stay under Rhines v. Weber, 544 U.S. 269 (2005), and Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), and states that petitioner is requesting a stay under Rhines. Id. at 1-5. A Rhines stay is available for (1) a petition containing only unexhausted claims, or (2) a petition that is “mixed” (contains both exhausted and unexhausted claims) and preserves the federal filing date for unexhausted claims contained in the federal petition. See Rhines, supra; see also Mena v. Long, 813 F.3d 907, 910 (9th Cir. 2016). In order to obtain a stay under Rhines, the petitioner must show that (1) good cause exists for his failure to have first exhausted the claims in state court, (2)

1 the claim or claims at issue potentially have merit, and (3) petitioner has not intentionally delayed
2 pursuing the litigation. Rhines, at 544 U.S. at 277-78. However, petitioner has not identified
3 which claims are unexhausted, explained why they have not yet been exhausted, or shown that
4 they have merit and that he has not intentionally delayed in pursuing them. Moreover, petitioner
5 fails to address the timeliness of the petition other than to indicate that he is claiming actual
6 innocence and that he has new evidence to offer, though no new evidence is provided. ECF No.
7 11 at 5-6.

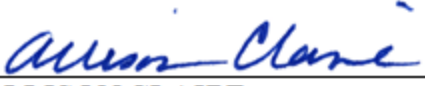
8 When petitioner was ordered to show cause why this action should not be dismissed, he
9 was cautioned that in order to pursue a claim for actual innocence he would be required to submit
10 new evidence for consideration. ECF No. 10 at 3. Absent new evidence, petitioner fails to
11 demonstrate that he is entitled to tolling. Petitioner will be given one more opportunity to
12 produce new evidence of his actual innocence to support his claim that he is entitled to equitable
13 tolling. Failure to produce any such evidence will result in the recommendation that the petition
14 be dismissed as untimely.¹ Petitioner will also be given an opportunity to supplement his motion
15 for a stay. However, he is cautioned that the request for a stay will not be considered unless and
16 until he shows that the petition is timely.

17 Accordingly, IT IS HEREBY ORDERED that:

18 1. Within twenty-one days of the service of this order, petitioner shall submit new
19 evidence in support of his claim that he is entitled to equitable tolling on the ground that he is
20 actually innocent. Failure to produce any new evidence will result in a recommendation that the
21 petition be dismissed as untimely.

22 2. Within twenty-one days of the service of this order, petitioner may supplement his
23 motion for a stay by providing information regarding his unexhausted claims as set forth above.

24 DATED: September 26, 2022

25 
26 ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

27 _____
28 ¹ Petitioner is advised that even if he produces the new evidence, there is no guarantee that it will
entitle him to equitable tolling and the petition may still be deemed untimely.